

# Statutory Review

## Statutory Review of sections 25A and 25B of the *Crimes Act 1900*

May 2017

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# 1. Executive Summary

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This review is a report to the NSW Government following the statutory review of sections 25A and 25B of the *Crimes Act 1900* (**the Act**).

The sections were inserted into the Act by the *Crimes and Other Legislation Amendment (Assault and Intoxication) Act 2014* (**the Amendment Act**), which commenced on 31 January 2014.

The amendments introduced new offences of Assault causing death (section 25A) and a mandatory minimum sentence of eight years imprisonment if convicted of committing the offence when intoxicated (section 25B).

The review was conducted on behalf of the Attorney General and the Minister for Police by the NSW Department of Justice (**the Department**), in accordance with clause 75 of Schedule 11 of the Act. That clause requires the Attorney General and the Minister for Police to conduct a statutory review within three years of the date of assent of the Amendment Act, and to report to the Premier on the outcome of the review as soon as practicable.

The review encompasses the period January 2014 to April 2017 and examines the operation of the relevant sections of the Act with respect to its policy objectives.

Key stakeholders were invited to make a submission to the review. A schedule of persons and organisations that made submissions is at **Attachment A**.

Over the review period there were no convictions for either the basic or aggravated offence of assault causing death in NSW. However, a defendant pleaded guilty on 4 April 2017 to the basic offence as an alternative to manslaughter. During the review period, there were ten people charged with assault causing death under section 25A of the Act, with five pending prosecutions for assault causing death contrary to section 25A of the Act. In a sixth matter, a charge of murder has replaced the charge of assault causing death.

The Department concludes that the policy objectives of the amendments to the Act remain valid. The Department supports the retention of the offences and supports the principle of a lengthy sentence of imprisonment for the aggravated offence. However, the Department notes that the law is largely untested.

The Department recommends that a further review is undertaken in three years. In view of the lack of convictions under section 25A of the Act, there has been insufficient judicial consideration of the effectiveness of the offences to warrant further amendment. A review in three years will provide the Government the opportunity to consider in detail the operation of the offences under section 25A, and the mandatory minimum sentence under section 25B of the Act.

## 2. Recommendation

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### Recommendation 1

That a further review of sections 25A and 25B of the Act is conducted as soon as practicable after 31 January 2020.

## 3. Statutory review

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### 3.1 Introduction

The Amendment Act introduced two offences of Assault causing death: sections 25A(1) (the basic offence of assault causing death) and 25A(2) (the aggravated version of Assault causing death when intoxicated) into the Act. The Amendment Act also introduced a mandatory minimum sentence and mandatory minimum non-parole period of 8 years imprisonment where a person is found guilty of an offence under section 25A(2).

The relevant provisions are reproduced in **Attachment B**.

The Amendment Act was introduced in response to serious alcohol fuelled violence in entertainment districts of Sydney.

### 3.2 Conduct of the review

The review was conducted on behalf of the Attorney General and Minister for Police by the Department. This is the first review of the changes to the Act made by the Amendment Act.

The review covers the period January 2014 to April 2016 and examines the operation of section 25A and 26B of the Act with respect to its policy objectives.

The policy objectives of the Amending Act are:

- (1) The effective operation of an offence that covers circumstances where a person unlawfully assaults another person by intentionally hitting the other person with any part of his or her body, or with an object he or she is holding, causing the death of the other person.
- (2) Appropriate sentencing of those found guilty of these offences to respond to community concern about the impact of alcohol-related violence, including 'one punch' deaths.

A number of submissions were received and are considered below, grouped according to the issue discussed in the submissions. A full list of stakeholders who provided a response to the Review is at Attachment A.

### 3.3 Use of section 25A(1) and 25A(2) to date

There were no convictions for either the basic or aggravated offence of assault causing death in NSW over the period of the review. However, on 4 April 2017 a defendant pleaded guilty to the basic offence of assault causing death as an alternative to manslaughter. Sentencing has been adjourned until 23 June 2017.

As at April 2017 there have been ten people charged with assault causing death under section 25A of the Act, with five pending prosecutions for assault causing death contrary to section 25A of the Act. In a sixth matter a charge of murder has replaced the charge of assault causing death.

## 4. A separate offence for assault causing death

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Parliament considered that a separate offence was appropriate to make clear how a person should be prosecuted and punished where that person has assaulted another person causing their death. To achieve this, a separate provision that specifically deals with this form of conduct was enacted.

The new assault causing death offences under section 25A were intended to replicate similar 'one punch' offences in other jurisdictions. For example, in Western Australia, section 281 (Unlawful assault causing death) of the *Criminal Code (WA)* makes it an offence if a person unlawfully assaults another person who dies as a direct or indirect result of the assault. Section 281(2) of the *Criminal Code (WA)* specifically prescribes that a person is criminally responsible even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.

In Code jurisdictions, standalone 'one punch' offences provide that even where it was not reasonably foreseeable that the victim would die from an assault, the fact that the victim did die is sufficient to prove the offence.

In NSW, the manslaughter offence is significantly broader than Code jurisdictions. In NSW, manslaughter includes where the death is caused by an 'unlawful and dangerous act.' To prove the commission of this offence, the prosecution must prove that the accused person intended to commit an unlawful and dangerous act, that serious harm caused by the dangerous act was reasonably foreseeable, and that that act caused the death of the victim. There is clear case law that assault falls within the ambit of 'unlawful and dangerous act.'<sup>1</sup>

Foreseeability of the death of the victim is not an element that the prosecution must prove in NSW to prove manslaughter.<sup>2</sup> The offence under section 25A(1), therefore, creates an alternative offence to manslaughter. For a person to be found guilty of an offence under section 25A(1), the prosecution must prove beyond reasonable doubt that the accused:

- (1) assaulted the victim,
- (2) by intentionally hitting the victim with any part of the accused's body or an object held by the accused,
- (3) that the assault was without authorisation or lawful excuse, and,
- (4) that the assault caused the victim's death.

For a person to be convicted of an aggravated offence under section 25A(2), the prosecution must provide beyond reasonable doubt that the accused was 18 years or above and was intoxicated either by alcohol or drugs, or both.

### Submissions

The NSW Bar Association, Legal Aid NSW and Associate Professor Julia Quilter of the University of Wollongong supported the repeal of the provisions. Legal Aid NSW and Professor Quilter submitted that the 'one punch' deaths are already covered by *Manslaughter by unlawful and dangerous act* (section 18 of the *Crimes Act 1900*).

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<sup>1</sup> See *Wilson v The Queen* (1992) 174 CLR 313

<sup>2</sup> Manslaughter by an 'unlawful and dangerous act' requires the prosecution to prove that a reasonable person in the position of the accused would have appreciated that the act was 'dangerous' and that it exposed another person to a risk of serious injury. The prosecution is not required to prove that death itself was reasonable foreseeable.

Submissions from the Police Association of NSW, the NSWPF and the DPP supported retention of section 25A as drafted. The Police Association of NSW noted that between 2000 and 2012, there were 28 'king hit' deaths in NSW.<sup>3</sup>

The Director of Public Prosecutions' (DPP) and New South Wales Police Force (NSWPF) submissions submitted that the fact there have been no convictions to date does not diminish the policy objective of having a standalone offence. The DPP submission reviewed not only the cases where people have been charged under section 25A but also where the accused has been charged with murder or manslaughter where the facts could possibly have given rise to an offence under section 25A. The DPP submission notes that section 25A applies in factually limited situations and that the majority of matters involving unlawful killing do not fit within it.

### **The Department's view**

The existing offence of dangerous and unlawful act manslaughter covers the types of cases which might be prosecuted as assault causing death. However, section 25A provides additional scope for prosecution of 'one punch' assaults, and clearly represents Parliament's intent that this form of conduct should be dealt with differently to the existing offence of dangerous and unlawful act manslaughter.

The limited application with the offence leads the Department to conclude that at this stage a separate offence should be retained. The Department recommends a further review in three years to enable the finalisation of current matters before the courts and adequate judicial consideration of the offences.

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<sup>3</sup> Police Association of NSW submission, 3; Pilgrim J, Gerostamoulos D, Drummer O (2014) "King hit" fatalities in Australia, 2000-2012: The role of alcohol and other drugs", *Drug and Alcohol Dependence* 135, 120.

## 5. Operation of section 25A

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### 5.1 What does ‘causing’ death mean under section 25A?

The Amendment Act was introduced to specifically deal with assaults that ‘cause’ the death of another person. The Second Reading Speech by the then Premier, the Honourable Barry O’Farrell MP, makes clear that the offences under section 25A are intended to deal specifically with ‘one punch’ attacks.<sup>4</sup> Section 25A was not intended to cover the field for all assaults causing death, which were already covered by manslaughter.

The issue of legal causation is a question of fact under the criminal law. It is a question for the jury to determine whether there is a sufficient causal connection between the conduct of the accused and the death of the victim to prove causal responsibility to the accused.<sup>5</sup>

#### Submissions

While at the time of stakeholder consultation there had been no convictions under section 25A, Professor Quilter submitted the Review should assess whether the causation element of the offence is likely to operate as originally intended. Professor Quilter argued that the current construction of the causation provision for the offence at section 25A(3) may mean that a person is not guilty where neither the assault or the hitting of the ground or object actually causes the death.<sup>6</sup>

This may be where a person is hit and falls into water and drowns or where they are hit and collapse onto a bed and die of asphyxiation. In these circumstances, Professor Quilter submitted that the assault itself would not cause the death, and there may be a sufficient break in the chain of causation.

The DPP submission noted conduct which may fall outside of the causation definition in section 25A(3) is likely to still fall within the ambit of either murder or manslaughter.

#### The Department’s view

While section 25A(3) may limit causation with respect to assault causing death, this appears to be the legislative intention of Parliament to ensure that the offence deals only with the specific issue of ‘one punch’ deaths. Other forms of conduct that may cause the death of another person can still be dealt with as either manslaughter or murder. The Department therefore concludes that no change is required to the causation element of the offence under section 25A at this time.

### 5.2 What is meant by ‘intentional hitting’ under section 25A?

Section 25A(1)(a) provides that a person will be guilty of assault causing death where the person assaults another person by ‘intentionally hitting’ the other person with any part of the person’s body or with an object held by the person.

Further, the assault must be intentional. The *mens rea* requirement under section 25A is merely an intention to hit another person but does not extend to where a person recklessly assaults another person. This differentiates a section 25A assault from common assault and

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<sup>4</sup> New South Wales, *Parliamentary Debates*, Legislative Assembly, 30 January 2014, 26621-26625, Barry O’Farrell, Premier).

<sup>5</sup> *Ryan v The Queen* (1967) 121 CLR 205, 218-220 (Barwick CJ).

<sup>6</sup> Quilter, above n 1, 92.



manslaughter. The latter two offences can be proved where there is mere recklessness by the accused.

### **Submissions**

Professor Quilter queried the arbitrary limitation of the conduct to the hitting by a part of the body or a 'held' object. The phrase 'intentionally hitting' expressly limits the operation of the offence to a particular form of assault, specifically that there is an application of force, rather than mere touching, and that the person hitting does so with either their body or an object held by the person. Section 25A, therefore, does not extend to where a person assaults another with a missile, for example where a person throws a bottle or brick.

### **The Department's view**

The provision reflects the legislative intention that section 25A deals specifically with 'one punch' type assaults, rather than serving as a broad offence covering all forms of assault. The conduct that may fall outside of this offence remains covered by the other offences of murder or manslaughter. In the absence of judicial consideration the provisions, there is, at this stage, no basis for making changes to the elements of the offence.

## **5.3 Determining a person's intoxication for the aggravated offence**

The 2014 amendments to the Act were a direct response to drug and alcohol fuelled violence in entertainment precincts in Sydney. Section 25A(2) provides for an aggravated offence if the accused is aged 18 years or above and commits the offence while intoxicated. 'Intoxication' is defined in section 428A of the Act as 'intoxication because of the influence of alcohol, a drug or other substance.'

Under existing law, whether a person is intoxicated will be determined on the facts, for example the accused person was slurring their words or stumbling.<sup>7</sup>

In addition to the existing tests for whether a person is 'intoxicated', section 25A(6) contains a deeming provision. Where a person is subject to a breath analysis that returns a finding of 0.15 grams or more in 220 litres of breath or 100 millilitres of blood, they are conclusively presumed to be intoxicated by alcohol.

Section 25A(6)(a) allows for evidence to be given of the presence and concentration of any alcohol, drug or other substance in the accused's breath, blood or urine at the time of the alleged offence as determined by an analysis carried out under Division 4 (Testing of certain offenders for intoxication) of Part 10 of the *Law Enforcement (Powers and Responsibilities) Act 2002*. This Division applies provisions of Schedule 3 to the *Road Transport Act 2013* for the taking, handling and analysis of samples. This can involve a back-calculation of the level of intoxication at the time of the alleged offence.

A 'back-calculation' assumes that alcohol is metabolised at a certain rate and it is therefore possible to take a sample of blood, urine or breath at a future point and back-calculate alcohol concentration to a given time, specifically the time of the assault; the longer the lapse of time between the assault and the taking of the sample, the wider the range of possible upper and lower levels of alcohol concentration. The calculation is subject to variables such as height and weight of the suspect, and for evidential purposes in criminal proceedings, the lower level is the appropriate figure for the criminal standard of proof (beyond reasonable doubt).

While the offence appears to operate effectively where a person can be breathalysed or a sample can otherwise be taken at the scene or immediately after the assault, there may be some limitations where the accused person is not able to be tested immediately, or is able to avoid apprehension after the assault.

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<sup>7</sup> See *R v O'Connor* (1980) 146 CLR 64, 71 (Barwick CJ).

## Submissions

The NSWPF submitted that two amendments should be made to the powers under Division 4 of Part 10 of the *Law Enforcement (Powers and Responsibilities) Act 2002* in relation to Police powers to direct a blood or urine sample to be given. The first is an amendment to section 138G(3) to extend the time from the alleged offence for taking a blood or urine sample from four hours to six hours. This is on the basis that the period during which samples should be able to be taken should mirror that of section 115 of the *Law Enforcement (Powers and Responsibilities) Act 2002*, which provides for an initial maximum six hour investigation period following arrest. The NSWPF submission did not outline any examples where an investigation had been impeded by the existing four hour time limit.

The ODP, Public Defenders Office, Legal Aid NSW and the Law Society of NSW submitted that increasing the time limit for taking a bodily fluid sample should not be adopted for two reasons. First, it would decrease the reliability of the accuracy of the back-calculated level of intoxication. Secondly, it would establish a scheme inconsistent with the exercise of the similar powers under Schedule 3 of the *Road Transport Act 2013*.

Secondly, NSWPF submitted that section 138D of the *Law Enforcement (Powers and Responsibilities) Act 2002* should be amended to include persons suspected of committing an aggravated offence under section 25A (2) but who have not been arrested because they have been taken to hospital.

The Law Society of NSW submitted that the power to direct a sample be given should be restricted to where a person is under arrest. The *Law Enforcement (Powers and Responsibilities) Act 2002* contains safeguards to ensure a person has a right to medical attention while under arrest and the 'detention clock' is suspended for this purpose. Section 138D already provides for a sample to be taken from persons under arrest in hospital if suspected of an assault that may create liability to be charged under section 25A(2) of the *Crimes Act 1900*.

Legal Aid NSW and the Public Defenders both submitted that NSW Police could acquire the person's medical records to determine intoxication levels, and as such, the amendment is unnecessary.

Professor Quilter submitted separately that consideration should be given to clarifying that the relevant time limits for taking breath, blood or urine samples under the *Law Enforcement (Powers and Responsibilities) Act 2002* commence at the time of the assault rather than at the 'commission of the offence.' This is on the basis that it could be argued that the offence is not completed until the victim dies, which may be a significant period of time after the assault. On the same basis, this issue may also apply to when the offender is intoxicated for the purposes of the offence in section 25A.

On these issues, the Law Society noted section 138D of the *Law Enforcement (Powers and Responsibilities) Act 2002* specifically anticipates the situation where an assault has been committed but the person has not yet died, and allows police to take samples. The alleged offence triggering the powers in sections 138F and 138G are section 25A of the *Crimes Act 1900*, or any other offence involving assault. As such, the Law Society submitted no amendment is necessary.

Similarly, in relation to the section 25A offence, the Public Defender submitted no amendment was necessary, as the offence referred to in s 25 (2) is that described in section 25(1)(a), namely assaulting another person by intentionally hitting them with any part of the body or with an object, and that this is clearly the relevant time at which the assailant must be intoxicated.

## The Department's view

The NSWPF raise proposals which affect the operational nature of investigations for serious offences. The majority of stakeholders oppose these proposed reforms. The Department agrees that there are arguments for and against reform of the process of taking bodily fluid samples for determining intoxication in these particular cases. However, the absence of judicial consideration of the law and evidence of the extent to which investigations are impeded (or otherwise) leads the Department to conclude that it would be premature to recommend reforms to the law that applies to these procedures at this time.

In relation to the clarity of the commencement of time periods, the Department considers there is no need for legislative change. The powers in section 138D of the *Law Enforcement (Powers and Responsibilities) Act 2002* provide the necessary scope for Police to take samples following a 'one punch' assault that may lead to the death of the victim. The Department also considers section 25A is unambiguous, and given the absence of litigated matters testing the law, there is no clear basis for reform.

The Department therefore concludes that no changes should be made to section 25A of the *Crimes Act 1900* or Division 4 of Part 10 of the *Law Enforcement (Powers and Responsibilities) Act 2002* at this time, particularly given the lack of evidence at present about how the sections are working in practice. Any issues around intoxication that arise should be considered once more evidence is available.

## 5.4 Conclusion

### Recommendation 1

That a further review of sections 25A and 25B of the Act is conducted as soon as practicable after 31 January 2020.

In view of the lack of convictions for either the basic or aggravated offences and the limited judicial consideration of section 25A, the Department concludes that the offences should be retained without amendment. Section 25A(1) and 25A(2) were introduced to deal with specific factual circumstances where a person has committed a 'one punch' or similar assault and caused the death of another person in response to community concerns about alcohol-fuelled violence. The causation and 'intentional hitting' elements of the offence reflect this.

The Department also consider there is insufficient evidence to support changes to the operation of section 25A or Division 4 of Part 10 of the *Law Enforcement (Powers and Responsibilities) Act 2002* at this time. However, the Department recommends that further consideration is given to the offences in three years. This should enable finalisation of current matters and adequate judicial consideration of the offences. It is also expected that more evidence will be available about how the offences operate in practice.

## 6. Sentencing for Assault Causing Death

### 6.1 The hierarchy of homicide offences and maximum penalties

Where a person is found guilty of an offence under section 25A(1) they are subject to a maximum penalty of 20 years imprisonment.

A person found guilty of the aggravated offence under section 25A(2) is subject to a maximum penalty of 25 years imprisonment. Further, the court is required to impose a mandatory minimum sentence of imprisonment of not less than 8 years, with any non-parole period for the sentence also required to be not less than 8 years.

The table below outlines the maximum penalties available for homicides in NSW.

| Offence                                   | Maximum Penalty | Standard Non-Parole Period | Mandatory Minimum Sentence | Minimum Non-Parole Period |
|-------------------------------------------|-----------------|----------------------------|----------------------------|---------------------------|
| Murder                                    | Life            | 20 years                   | N/A                        | N/A                       |
| Murder of police officer                  | Life            | 25 years                   | Life                       | N/A                       |
| Manslaughter                              | 25 years        | N/A                        | N/A                        | N/A                       |
| Assault causing death                     | 20 years        | N/A                        | N/A                        | N/A                       |
| Assault causing death (While intoxicated) | 25 years        | N/A                        | 8 years                    | 8 years                   |

#### Submissions

Professor Quilter submitted that the maximum penalties for section 25A(1) and 25A(2) confused the previous 'hierarchy' of criminal offences.<sup>8</sup> Prior to the introduction of sections 25A and 25B, murder sat at the top the 'hierarchy' of criminal offences, with manslaughter sitting below. This was reflected by penalties of life (murder) and 25 years (manslaughter).

Where an offence sits in this hierarchy not only specifies the maximum penalty a person found guilty will face but also communicates to the court the seriousness which Parliament imposes on that offence. Professor Quilter argues that assault causing death, if it is to remain a separate offence, should sit below manslaughter in the 'hierarchy' as it does not have the "subjective fault elements of murder nor the objective fault elements of manslaughter,"<sup>9</sup> which makes it a less culpable form of homicide.

#### The Department's view

Assault causing death contains specific elements which may distinguish the offence from murder or manslaughter. The offence results in the death of a person in the same way that manslaughter does. Moreover, the 25 year maximum penalty reflects Parliament's intention that alcohol and drug related violence that causes the death of another is a serious offence

<sup>8</sup> Quilter, above n 1, 88.

<sup>9</sup> Ibid.

that is comparable to manslaughter. Accordingly, no change to the maximum penalty is warranted.

### 6.3 Mandatory minimum sentence

The Amendment Act introduced a mandatory minimum sentence for offences under section 25A(2) of 8 years imprisonment (section 25B).

NSW does not generally impose a mandatory minimum sentence for criminal offences as they interfere with judicial discretion. Mandatory minimum sentences, though seldom used, are intended to reflect a societal judgment determined by Parliament that an offence demands a specified minimum penalty, and ensure that a person found guilty of that offence cannot avoid appropriate punishment.

A mandatory 8 year non-parole period means that if a court considers rehabilitation through the parole system is appropriate, it may be required to impose an artificially high head sentence to allow for a term of parole.

#### Submissions

The majority of submissions received by the Review support the repeal of section 25B, which also prescribes a minimum non-parole period of 8 years.

The NSW Bar Association, Law Society of NSW, Legal Aid NSW, Aboriginal Legal Service NSW/ACT, the District Court of NSW and Professor Quilter support the repeal of section 25B, arguing that mandatory minimum sentences unnecessarily fetter the discretion of the sentencing judge to account for the circumstances of the offence.

Legal Aid NSW argue that mandatory minimums remove the ability of a sentencing judge to taken into consideration the factors set out in section 21 (aggravating, mitigating and other factors in sentencing) of the *Crimes (Sentencing Procedure) Act 1999*, which may as a consequence produce excessive and unfair sentences.

The Aboriginal Legal Service NSW/ACT also submits that section 25B should be repealed, arguing that mandatory sentences generally have a disproportionate impact upon Aboriginal and Torres Strait Islander communities.

Legal Aid NSW also argue that notwithstanding whether mandatory minimum sentences should be available for any offences, it is particularly ill suited to manslaughter. Relying on *R v Merrick (No 5)* [2016] NSWSC 661 and *R v Field* [2014] NSWSC 1797, Legal Aid NSW argue that manslaughter covers a range of conduct; from conduct just short of murder to conduct where a nominal penalty will suffice.<sup>10</sup>

The Police Association of NSW and the DPP support the retention of section 25B, arguing that the mandatory minimum appropriately reflects community expectations that alcohol related 'one punch' deaths should be punished appropriately. The Police Association of NSW submitted

...the reason for the differentiation [between intoxicated and non-intoxicated assaults] is because the link between alcohol and violence was causing considerable harm to individuals and the community, and therefore the crimes established by Parliament needed to target that specific cause of violence.<sup>11</sup>

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<sup>10</sup> Legal Aid NSW submission, 4; *R v Field* [2014] NSWSC 1797, [91] (Fullerton J).

<sup>11</sup> Police Association of NSW, 4.

### **The Department's view**

The Department agree that there are strong arguments both for the retention and removal of the mandatory minimum sentences for assault causing death while intoxicated. However, as there has been no judicial consideration of section 25B of the Act to date, the Department recommend that this issue be considered as part of the review to be held in three years.

## 7. Further issues

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### 7.1 Operation of defences

As no person was convicted of an offence under sections 25A(1) or (2) over the review period (January 2014 to March 2017), the Department did not consider the defences available under sections 25A and 25B in significant detail. The guilty plea entered by the defendant at Newcastle District Court on 4 April 2017 does not alter this position.

The Department notes that, under section 25A(5) of the Act, it is a defence in proceedings for an offence under subsection 25A(2) of the Act if:

- a) the intoxication of the accused was not self-induced (within the meaning of Part 11A of the Act), or
- b) if the accused had a significant cognitive impairment at the time the offence was alleged to have been committed (not being a temporary self-induced impairment).

Other possible defences to offences under sections 25A(1) and 25A(2) may include an absence of voluntariness; mental illness; necessity; duress; and self-defence. These should be considered in the next review of sections 25A and 25B of the Act.

## **Attachment A – List of submissions to the review**

Submissions to the Review were received from the following individuals and organisations:

- The Chief Judge of the District Court
- Law Society of NSW
- NSW Police Force
- Legal Aid NSW
- Aboriginal Legal Service
- Public Defender's Office
- Police Association of NSW
- Office of the Director of Public Prosecutions
- NSW Bar Association
- Associate Professor Julia Quilter, University of Wollongong



# Attachment B – Sections 25A and 25B Crimes Act 1900

## 25A Assault causing death

(1) A person is guilty of an offence under this subsection if:

- (a) the person assaults another person by intentionally hitting the other person with any part of the person's body or with an object held by the person, and
- (b) the assault is not authorised or excused by law, and
- (c) the assault causes the death of the other person.

Maximum penalty: Imprisonment for 20 years.

(2) A person who is of or above the age of 18 years is guilty of an offence under this subsection if the person commits an offence under subsection (1) when the person is intoxicated.

Maximum penalty: Imprisonment for 25 years.

(3) For the purposes of this section, an assault causes the death of a person whether the person is killed as a result of the injuries received directly from the assault or from hitting the ground or an object as a consequence of the assault.

(4) In proceedings for an offence under subsection (1) or (2), it is not necessary to prove that the death was reasonably foreseeable.

(5) It is a defence in proceedings for an offence under subsection (2):

- (a) if the intoxication of the accused was not self-induced (within the meaning of Part 11A), or
- (b) if the accused had a significant cognitive impairment at the time the offence was alleged to have been committed (not being a temporary self-induced impairment).

(6) In proceedings for an offence under subsection (2):

- (a) evidence may be given of the presence and concentration of any alcohol, drug or other substance in the accused's breath, blood or urine at the time of the alleged offence as determined by an analysis carried out in accordance with Division 4 of Part 10 of the Law Enforcement (Powers and Responsibilities) Act 2002, and
- (b) the accused is conclusively presumed to be intoxicated by alcohol if the prosecution proves in accordance with an analysis carried out in accordance with that Division that there was present in the accused's breath or blood a concentration of 0.15 grams or more of alcohol in 210 litres of breath or 100 millilitres of blood.

(7) If on the trial of a person for murder or manslaughter the jury is not satisfied that the offence is proven but is satisfied that the person has committed an offence under subsection (1) or (2), the jury may acquit the person of murder or manslaughter and find the person guilty of an offence under subsection (1) or (2). The person is liable to punishment accordingly.

(8) If on the trial of a person for an offence under subsection (2) the jury is not satisfied that the offence is proven but is satisfied that the person has committed an offence under subsection (1), the jury may acquit the person of the offence under subsection (2) and find the person guilty of an offence under subsection (1). The person is liable to punishment accordingly.

(9) Section 18 does not apply to an offence under subsection (1) or (2).

(10) In this section, cognitive impairment includes an intellectual disability, a developmental disorder (including an autistic spectrum disorder), a neurological disorder, dementia, a mental illness or a brain injury.

### **25B Assault causing death when intoxicated—mandatory minimum sentence**

(1) A court is required to impose a sentence of imprisonment of not less than 8 years on a person guilty of an offence under section 25A (2). Any non-parole period for the sentence is also required to be not less than 8 years.

(2) If this section requires a person to be sentenced to a minimum period of imprisonment, nothing in section 21 (or any other provision) of the Crimes (Sentencing Procedure) Act 1999 or in any other Act or law authorises a court to impose a lesser or no sentence (or to impose a lesser non-parole period).

(3) Nothing in this section (apart from subsection (2)) affects the provisions of the Crimes (Sentencing Procedure) Act 1999 or any other Act or law relating to the sentencing of offenders.

(4) Nothing in this section affects the prerogative of mercy.

# Attachment C – Jurisdictional comparison of one-punch laws

## Northern Territory: violent act causing death

The NT introduced a 'one punch' offence in 2012 through the *Criminal Code Amendment (Violent Act Causing Death) Act 2012* (NT), which inserted section 161A into the *Criminal Code Act 1983* (NT). The amending act commenced on 21 December 2012.

A person is guilty of the offence of a 'violent act causing death' under section 161A if they:

- engage in conduct involving a violent act to another person, and,
- that conduct causes the death of that other person, or any other person.

Conduct involving a violent act means conduct involving the direct application of force violently to a person, with or without the use of an offensive weapon (section 161A(5)). The defendant is criminally responsible for the offence even if the other person consented to the violent conduct.

The maximum penalty for the offence under section 161A is imprisonment for 16 years. There is no mandatory minimum sentence or non-parole period. As section 161A is a level one violent offence under the *Sentencing Act 1995* (NT), it is only when an offender has a previous violent offence conviction that the court must impose a term of imprisonment (section 78DF).

On 5 September 2016 the Criminal Justice Research and Statistics Unit of the Department of the Attorney General and Justice (NT) reported that a total of eight persons have been charged with offences under section 161A of the *Criminal Code Act 1983*. Of these:

- three persons were convicted and received a sentence of imprisonment,
- one was found not guilty,
- three had their charges withdrawn but were charged/convicted of other offences such as manslaughter, aggravated assault and murder, and,
- one matter is yet to be finalised.

## Queensland: unlawful striking causing death

Queensland introduced a 'one punch' homicide offence in 2014 through the *Safe Night Out Legislation Amendment Act 2014* (Qld) which inserted section 314A into the *Criminal Code Act 1899* (QLD).

For a person to be guilty of the offence of 'unlawful striking causing death' contrary to section 314A, the prosecution must prove:

- that the defendant struck the deceased to the head or neck,
- that the striking was unlawful,
- that the striking caused (directly or indirectly) the death of the deceased, and,
- that the striking was not done as part of a socially acceptable function or activity (including a sporting event) that was reasonable in the circumstances.

To strike a person means to directly apply force to the person by punching, kicking or by otherwise hitting using any part of the body, with or without the use of a weapon (section 314A). Assault, as defined in section 245, is not an element of the offence that the prosecution are required to prove (section 314A(3)).

The maximum penalty for the offence under section 314A is life imprisonment. If a court sentences a person to a term of imprisonment the person is required to serve a minimum of 80 per cent of the term of imprisonment or 15 years, whichever is lesser (section 314A(5)). These minimum requirements do not apply if the court sentences the person to life imprisonment.

imprisonment, an indefinite sentence or to an intensive correction order or suspended sentence (section 314A (6)).

On 19 September 2016, the Queensland Public Safety Business Agency and Queensland Office of the Director for Public Prosecutions (ODPP) reported that the ODPP has not had carriage of any finalised matters. The ODPP is currently prosecuting five persons charged under 314A. In common with NSW, there have been no convictions in Queensland for unlawful striking causing death.<sup>12</sup>

### **Victoria: single punch is a dangerous act for manslaughter**

Victoria introduced a 'one punch' homicide provision in 2014 in the *Sentencing Amendment (Coward's Punch Manslaughter and Other Matters) Act 2014*. This inserted section 4A into the *Crimes Act 1958 (Vic)*, which states that a single punch or strike is taken to be a dangerous act for common law offence of manslaughter by unlawful and dangerous act.

For a person to be guilty of this offence the prosecution must prove beyond reasonable doubt:

- that the accused committed an act that caused the death of another person,
- that the act was committed consciously, voluntarily and deliberately,
- that the act was unlawful, and,
- that the act was dangerous.

Section 4A(4) provides that a single punch or strike may be the cause of a person's death even if the injury is from secondary impact, for example by victim hitting the road with their head

If the Director of Public Prosecutions files a notice of intention to seek the statutory minimum sentence for manslaughter under section 9A of the *Sentencing Act 1991 (Vic)*, the court must impose a term of imprisonment and fix a non-parole period of at least 10 years (section 9C(2)). The court is not required to impose this minimum term of imprisonment if a special reason exists (section 10A); for example, if the accused suffers from impaired mental functioning or has given assistance to law enforcement authorities.

On 6 September 2016, the Victoria Crime Statistics Agency reported no use of section 4A *Crimes Act 1958* by Victoria Police Force members. However, the Office of the Director of Public Prosecutions, Victoria, reported one pending case of murder which may become a manslaughter charge and rely upon section 4A to prove the dangerous act. A notice seeking the mandatory minimum 10 years imprisonment has been served.

### **Western Australia: unlawful assault causing death**

Western Australia introduced a 'one punch' homicide offence in 2008 in the *Criminal Law Amendment (Homicide) Act 2008 (WA)* which inserted section 281 into the *Criminal Code Act Compilation Act 1913 (WA)*.

A person is guilty of the offence of 'unlawful assault causing death' contrary to section 281, if they:

- unlawfully assault another person, and,
- the other person dies as a direct or indirect result of the assault.

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<sup>12</sup> Queensland Government Public Safety Business Agency Count of Charges and Charges Preferred 01/01/2014 to 31/08/2016 for charge types 314A and 47(9) Unlawful striking causing death – Domestic Violence offence and 314A Unlawful striking causing death

A person is criminally responsible for the offence even if they did not intend or foresee the death of the other person and even if the death was not reasonably foreseeable (section 281(2)).

The maximum penalty for an offence under section 281 is ten years imprisonment. If the offence is committed by an adult offender in the course of an aggravated home burglary, the court must impose a term of imprisonment of at least 7.5 years (section 281(3)), or in the case of a juvenile, a term of imprisonment or detention<sup>13</sup> of at least 3 years duration.

On 5 September 2016, the Office of the Director of Public Prosecutions for Western Australia advised that there have been a total of 19 convictions for unlawful assault causing death. All convictions attracted a term of imprisonment, ranging from one year four months to six years two months. The average sentence was 41.3 months.

### **England and Wales: lower threshold to prove manslaughter**

England and Wales do not have a separate statutory offence of assault related death. Similar single punch homicides are charged as either murder or manslaughter, depending on the facts of the case. In England and Wales, a charge for unlawful act involuntary manslaughter requires that the Crown prove to the criminal standard that a reasonable and sober bystander would recognise that the act in question (for example a single punch) exposed the victim to 'some harm'<sup>14</sup>. In NSW the prosecution must prove objective foresight of the risk of 'serious harm' to prove unlawful and dangerous act manslaughter.<sup>15</sup>

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<sup>13</sup> *Young Offenders Act 1994* (WA)

<sup>14</sup> *R v M* [2013] 1 WLR 1083.

<sup>15</sup> *Wilson v The Queen* (1992) 174 CLR 313.